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State v. Lopez-Orozco Appellant's Brief Dckt. 40859

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JORGE A. LOPEZ-OROZCO, Defendant-Appellant.	NO. 40859 ELMORE COUNTY NO. CR 2002-112 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

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STATEMENT OF THE CASE

Nature of the Case

Jorge Alberto Lopez-Orozco appeals from his judgment of conviction for three counts of first degree murder. Mr. Lopez-Orozco was found guilty at trial and the district court imposed three concurrent determinate life sentences. On appeal, Mr. Lopez-Orozco contends that the district court erred in finding that his brother was an unavailable witness and therefore allowing his testimony from the preliminary hearing transcript to be read into evidence. Mr. Lopez-Orozco further contends that the district court erred in permitting hearsay evidence in the form of an unsworn written statement allegedly adopted by his brother to be read into evidence.

Statement of the Facts and Course of Proceedings

On August 11, 2002, a burned car was found in a remote area of the desert. (Trial Tr., p.1306, L.1 - p.1307, L.3.) Inside the car were three burned bodies, one adult and two children. (Trial Tr., p.1415, Ls.7-18, p.1595, Ls.5-12.) The bodies were identified as Rebecca Ramirez and her children, Miguel and Ricardo. (Presentence Investigation Report (*hereinafter*, PSI), p.8.) The vehicle belonged to Mr. Lopez-Orozco, who had previously dated Ms. Ramirez. (PSI pp.3; 6). Almost nine years later, in 2011, Mr. Lopez-Orozco was arrested and charged with the murders. (R., p.21.)

At the jury trial in this case, the State presented the testimony of Jose Lopez-Orozco (*hereinafter*, Jose), Mr. Lopez-Orozco's youngest brother. (Trial Tr., p.2016, L.9 – p.2074, L.16.) Jose was present at the home of Mr. Lopez-Orozco's sister, Balvina Lopez-Orozco (*hereinafter*, Balvina), in San Jose, California when Mr. Lopez-Orozco purportedly discussed events that occurred on the evening of the murder. (Trial

Tr., p.2055, L.7 – p.2058, L.8; p.2065, L.1 – p.2068, L.23.) At trial, however, Jose testified that he did not remember overhearing his brother discussing why he left Idaho, he did not remember testifying at the preliminary hearing, and he did not remember making a statement to law enforcement in San Jose in 2002. (Trial Tr., p.2017, L.23 – p.2018, L.19.) Based on this lack of recall, the State asked that Jose be declared unavailable pursuant to Idaho Rule of Evidence 804(a)(3). (Trial Tr., p.2018, Ls.20-23.) Over the objections of defense counsel, the district court found Jose was unavailable and permitted the State to read the preliminary hearing testimony of Jose into the record. (Trial Tr., p.2019, L.15 – p.2025, L.20.) At the preliminary hearing, evidence surrounding the circumstances of an alleged confession and an unsworn statement were admitted. (Trial Tr., p.2046, L.17 – p.2074, L.16.) The district court then allowed the State to read into the record this unsworn statement attributed to Jose. (Trial Tr., p.2071, L.7 – p.2074, L.12.)

This unsworn statement indicates that in early July or August of 2002, Jose's brother Simon brought Mr. Lopez-Orozco to the apartment Jose shared with Balvina. According to this statement, Mr. Lopez-Orozco seemed sad and desperate, and he told Simon and Balvina that he had killed Rebecca and the children and had burned the vehicle with them inside. (Trial Tr., p.2072, Ls.12-18.) Further, according to the statement, Jose heard Mr. Lopez-Orozco state that he went to Oregon to pick up Ms. Ramirez, and

> When he arrived, he noticed some suspicious individuals in the area. Becky and her two children left with Jorge to Idaho. The suspicious individuals started following them in a truck and fired bullets at them. Jorge wasn't hit, and he was able to get rid of the individuals. At some point in time, a police car was behind them, but didn't stop them. Becky was telling Jorge that she would tell the police that he was keeping her against her will. Becky threatened to through one of the children out of the window if Jorge didn't stop the car. Jorge didn't stop the car. Jorge

> reacted to Becky's threats and shot her. Then Jorge took her body to a field and burned it inside the vehicle. Jorge didn't mention in detail what happened with the children.

(Trial Tr., p.2072, L.19 – p.2073, L.20.)

Mr. Lopez-Orozco denied any involvement in the deaths. The parties stipulated to the admission of an interview conducted between detectives and Mr. Lopez-Orozco. (*See* State's Exhibit 11.) In the interview, Mr. Lopez-Orozco stated that the allegations were not true. (State's Exhibit 11, p.8.) He stated that on the evening at issue, he was driving with Ms. Ramirez and the children; she and the children had been sleeping. While he was driving, some individuals began shooting at the vehicle. (State's Exhibit 11, pp.209-12.) Mr. Lopez-Orozco then stopped the vehicle in the middle of the road and took off running. (State's Exhibit 11, p.210.) He stated that he did not know anything else. (State's. Exhibit 11, p.212.)

The jury convicted Mr. Lopez-Orozco of three counts of first-degree murder. (Trial Tr., p.2857, L.21 – p.2858, L.17; R., pp.642-644.) The district court sentenced Mr. Lopez-Orozco to three concurrent determinate life sentences. (3/11/13 Tr., p.2908, Ls.7-15; R., pp.653-655.) Mr. Lopez-Orozco timely appealed. (R., pp.656-659, 668-675.) The State cross-appealed. (R., pp.664-667.)

ISSUES

1. Did the district court err in ruling that Jose Lopez-Orozco was an unavailable witness and then admitting his preliminary hearing testimony?

2. Did the district court err in allowing Jose's unsworn declaration to be read to the jury?

ARGUMENT

I.

The District Court Erred In Ruling That Jose Lopez-Orozco Was "Unavailable" As A Witness At Trial And Then Admitting His Preliminary Hearing Testimony

A. Introduction

At trial, the State called Jose Lopez-Orozco to testify to a conversation he overheard between the defendant and his brother and sister; however, Jose testified that he did not recall any such statements. When asked, Jose testified that maybe the reason he did not remember the statements made was due to the length of time that had passed and because this was an "emotionally charged issue." (Trial Tr., p.2018, Ls.10-18.) The State successfully sought to have Jose declared "unavailable" such that his preliminary hearing testimony could be read to the jury.

B. Standard Of Review

The determination whether to admit evidence under a hearsay exception is reviewed for an abuse of discretion. *State v. Field*, 144 Idaho 559, 567 (2007). The standard of review to determine whether the court erred in admitting Jose's preliminary hearing testimony is set forth in *State v. Ricks*, 122 Idaho 856, 863 (Ct. App. 1992), where the Idaho Court of Appeals held "we conclude that a case-by-case approach is the better way to determine whether the district court was correct in ruling that the preliminary hearing testimony was admissible. Where such findings are challenged on appeal, we would apply the 'clear error' standard of review." *Id.*

C. The District Court Erred In Ruling That Jose Lopez-Orozco Was "Unavailable" As A Witness At Trial And Then Admitting His Preliminary Hearing Testimony

1. Availability

The district court erred when it found Jose was unavailable under Idaho Rule of Evidence 804(a)(3). (Tr., p.2023, L.22 – p.2024, L.7.) I.R.E. 804(a)(3) states that: "[u]navailability as a witness" includes situations in which the declarant testifies to a lack of memory of the subject matter of declarant's statement. I.R.E. 804(a)(3).

The Idaho Court of Appeals has held, "it is not a lack of memory of having made the out-of-court statements that is pertinent under I.R.E. 804(a)(3), but rather lack of memory of the 'subject matter' of the out-of-court statements." *State v. Fair*, 156 Idaho 431, 435 (2014); *see also Milburn v. State*, 135 Idaho 701, 708 (Ct. App. 2000) (holding that I.R.E. 804(a)(3) requires the declarant testify to his lack of memory of the subject matter of the out-of-court statements). Further, "[t]he fact that the witness does not remember making the statements themselves is irrelevant." *Fair,* 156 Idaho at 435 (quoting *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013)).

In *Fair*, the witness was asked questions phrased in terms of his recollection such that the witness's responses did not show that he lacked memory of the subject matter, but merely that he lacked memory of having made the out-of-court statements themselves. *Id.* The Court of Appeals held that the hearsay exception that the defendant sought to utilize to admit the statements required unavailability of the declarant. Id. Where the defendant failed to show the witness was unavailable, the proffered evidence of the witness's out-of-court statements was therefore properly excluded. *Id.*

Jose's statements in this case indicate that he merely lacked memory of having made the out-of-court statements, not that he lacked memory of the subject matter. Jose testified that he did not recall any statements that Mr. Lopez-Orozco had made in his presence regarding his leaving Idaho in 2002:

> Q: Sir, do you recall any statements that the defendant made in your presence about his leaving Idaho in 2002?
>
> A: No.
>
> Q: Sir, do you recall any statements that you gave to law enforcement about what you overheard the defendant say?
>
> A: No.
>
> Q: Sir, do you recall the testimony that you provided on June 15, 2011 on these very issues?
>
> A: No.
>
> Q: And sir, is your lack of recall due to the length of time since 2002, when these events occurred?
>
> A: Maybe.
>
> Q: It's been a long time for you?
>
> A: Yes.
>
> Q: And this has been a very emotionally charged issue for you?
>
> A: Too emotional.
>
> Q: All right.

(Trial Tr., p.2017, L.23 – p.2018, L.19.) Based on Jose's lack of recall when asked these three questions, the State requested that he be declared unavailable pursuant to Idaho Rule of Evidence 804(a)(3). (Trial Tr., p.2018, Ls.20-23.) The district court found that, based on the testimony offered under oath, the State laid a sufficient factual basis from which the district court could determine that Jose lacked memory or recollection of

the incidents in question and was thus an unavailable witness pursuant to I.R.E. 804(a)(3). (Trial Tr., p.2023, L.22 – p.2024, L.7.) Over defense counsel's objection, the district court declared Jose unavailable and allowed the State to read aloud his preliminary hearing testimony. (Trial Tr., p.2019, L.15 – p.2025, L.20.)

However, Jose's responses do not show that he lacked a memory of the subject matter. First, because of the way the prosecutor phrased the questions, Jose's answers could indicate that only does Jose not recall any statements, but also that he never heard any statements made by the defendant about his leaving Idaho. (Trial Tr., p.2017, Ls.23-25.) Second, most of the prosecutor's questions did not inquire about Jose's memory of the subject matter of the conversation he overheard; rather, Jose was asked if he recalled any *statements* that he gave to law enforcement about what he overheard the defendant say. (Trial Tr., p.2018, Ls.2-4.) Finally, the State asked Jose if he recalled the testimony that he provided on June 15, 2011 on these very issues. (Trial Tr., p.2018, Ls.6-8.) To each of these questions, Jose responded "No." (Trial Tr., p.2018, Ls.1-9.) However, *Fair* and *Milburn* require more specific questioning before a witness can be declared unavailable.

The prosecutor's inquiry was insufficient - the pertinent inquiry is lack of memory of the subject matter of the out-of-court statement, not a lack of memory of having made the out-of-court statements themselves. *Fair*, 156 Idaho at 435. Thus, "[t]he fact that the witness does not remember making the statements themselves is irrelevant." *Id.* (quoting *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013)).

Here, the prosecutor's inquiry was insufficient to establish that Jose had no memory of the subject matter, where he had never previously stated that Mr. Lopez-

Orozco said the reason he left Idaho in 2002 was because he killed three people. Thus the prosecutor's questions were not designed to elicit an affirmative answer from Jose. The State inquired further, but the subsequent question asked of Jose was whether he recalled his written statement to law enforcement in 2002, and finally he was asked whether he recalled his testimony from the preliminary hearing in 2011. Thus, because Jose was never asked whether he remembered overhearing Mr. Lopez-Orozco say that he killed Becky and her kids, the State failed to establish that Jose did not recall the subject matter which the State sought to introduce at trial.

The State failed to establish that Jose did not recall overhearing his brother Jorge tell Balvina and Simon that he killed Becky and the children. The district court erroneously declared Jose unavailable and allowed his preliminary hearing testimony to be read to the jury. As this was the only testimony elicited regarding Mr. Lopez-Orozco's confession to killing Becky and the children, this error surely contributed to Mr. Lopez-Orozco's conviction for the charge and, as result, denied his right to a fair trial.

2. Preliminary Hearing

Three requirements that must be met before the district court may admit into evidence the recorded testimony from a preliminary hearing:

1. [The testimony offered is] [o]ffered as evidence of a material fact and that the testimony is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

2. [The testimony offered is] [t]hat the witness is, after diligent and good faith attempts to locate, unavailable for the hearing; and

3. That the preliminary hearing testimony, the party against whom the admission of the testimony is sought had an adequate opportunity to prepare and cross-examine the proffered testimony.

State v. Cross, 132 Idaho 667, 669 (1999) (quoting I.C. § 9-336). "To determine the admissibility of preliminary hearing testimony under I.C. § 9-336, a trial court must make factual findings as to the three requirements. Unless clearly erroneous, this Court will not disturb those findings." *Id.*

Mr. Lopez-Orozco asserts that the district court committed clear error when it admitted Jose's testimony from the preliminary hearing because the State failed to establish that Jose was unavailable to testify at trial. Pursuant to I.R.E. 804(b)(1), former testimony can qualify as an exception to the hearsay rule if the declarant is unavailable as a witness and "if the party against whom the testimony is now offered. . . had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." I.R.E. 804(b)(1). Further, Idaho case law has held:

> Under both the statute and rule, the first prerequisite for admission of preliminary hearing testimony at a later trial is a showing that the witness is unavailable. This unavailability must be established by the proponent of the testimony.

State v. Perry, 144 Idaho 266, 269 (Ct. App. 2007) (internal citations omitted) (holding that evidence was insufficient to establish unavailability of witness, therefore, admission of witness's preliminary hearing testimony was error); *State v. Button*, 134 Idaho 864, 869 (Ct. App. 2000) (holding that admitting former testimony of witness who missed his airline flight was error as witness was not "unavailable"); *Cross*, 132 Idaho at 670 (holding trial court erred in holding out-of-town witness was unavailable and in admitting witness's preliminary hearing testimony).

After Jose testified that he did not remember, the district court ruled that Jose was an unavailable witness and that the preliminary hearing transcript should be read to the jury as his prior testimony. (Trial Tr., p.2023, L.22 – p.2025, L.20.) The State then

read a substantial portion of the testimony to the jury. (Trial Tr., p.2046, L.11 – p.2069, L.1.) However, as discussed in Section 1, the district court erred in finding Jose was an unavailable witness, thus its subsequent decision to allow the preliminary hearing transcript to be read into the record was also erroneous as the State had failed to establish that the witness was unavailable pursuant to the requirements of I.C. § 9-336 and I.R.E. 804(b)(1).

II.

The District Court Erred In Permitting Jose's Unsworn Statement To Be Read To The Jury

A. Introduction

The district court erred when it allowed the unsworn statement attributed to Jose to be read to the jury. The unsworn statement was not prepared by Jose, substantial time had lapsed between the event and the preparation of the unsworn statement, Jose never adopted the unsworn statement, and it did not accurately reflect Jose's knowledge in 2002. Thus, the requisite safeguards to insure the probable accuracy of the statement were not present and the district court erred in allowing the statement to be read to the jury.

B. Standard Of Review

An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 51 (2009).

C. The District Court Erred In Permitting Jose's Unsworn Statement To Be Read To The Jury

Hearsay is a statement offered in evidence to prove the truth of the matter asserted. I.R.E. 801(c). There are a number of exceptions to the hearsay rule. One

such exception is the past recorded recollection exception. I.R.E. 803(5). This exception does not depend on the availability of the witness. I.R.E. 803. It provides:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

I.R.E. 803(5)[1]; *State v. Higgins*, 122 Idaho 590, 599 (Ct. App. 1992).

The rationale underlying this rule is to insure the trustworthiness of the writing containing the recollection by requiring that the event must have been clearly and accurately remembered by the witness at the time of the making of the writing. *United States v. FMC Corp.*, 306 F. Supp. 1106, 1137 (E.D. Pa. 1969). This is because the information contained therein is not subject to cross examination. *Id.*

In order for the statement to qualify as an exception to the hearsay requirements under 803(5), it must meet the following qualifications: (1) the witness once had knowledge about matters in the document; (2) the witness now has insufficient recollection to testify fully and accurately; and (3) the record was made or adopted at a

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[1] The corresponding Federal Rule of Evidence, Fed.R.Evid. 803(5), is nearly identical to the Idaho Rule, I.R.E. 803(5). Because there are few Idaho cases construing I.R.E. 803(5), the corresponding federal rule and the decisions of the federal courts when discussing and interpreting the federal rule may prove instructive. Further, the Court of Appeals has stated,

> Idaho adopted the Federal Rules of Evidence as the Idaho rules in order to obtain uniformity in trial practice in Idaho. *Chacon v. Sperry Corp.*, 111 Idaho 270, 275 (1986). In the absence of a ruling from the Idaho Supreme Court to the contrary, we deem it appropriate to follow federal precedent in order to maintain, to the extent possible, consistency between the federal and Idaho rules.

State v. Woodbury, 127 Idaho 757, 760, 905 P.2d 1066, 1069 (Ct. App. 1995)

time when the matter was fresh in the witness's memory and reflected his knowledge correctly. *United States v. Schoenborn*, 4 F.3d 1424, 1427 (7th Cir. 1993).[2]

There are few Idaho appellate cases addressing the past recollection recorded exception to the hearsay rule. In one case, *State v. Higgins*, 122 Idaho 590, 599-600 (Ct. App. 1992), the witness testified that she had no independent recollection of her testimony at the previous trial. However, she had taken notes at the first trial, she testified that she believed her notes to be accurate, and that she had no independent recollection of the testimony at the first trial without referring to the notes. *Id.* 122 Idaho at 599. The Idaho Supreme Court noted, in *dicta*, that pursuant to I.R.E. 803(5), had the defendant's attorney objected to the reading of the notes, the trial judge would have been correct in ruling that the state had laid a sufficient foundation for the admission of the notes, and that the witness could have read the notes into the record. *Higgins*, 122 Idaho at 600.

Here, the district court permitted the State to read the unsworn statement to the jury as a prior statement exception to the hearsay rules, under I.R.E. 803(5). (Trial Tr., p.2070, Ls.3-18.) The district court declined to allow the State to admit the unsworn statement into evidence as an exhibit, finding that the proponent of the statement was not an adverse party, as required by the rule. (Trial Tr., p.2070, Ls.9-16.) The unsworn statement was then read into the record. (Trial Tr., p.2071, L.7 – p.2074, L.12.)

1. Jose Did Not Prepare The Document And Declined To Adopt It

The first prerequisite to admission is that the witness lacks sufficient present recollection to enable the witness to testify fully and accurately. *United States v. Senak*,

[2] At the time the Seventh Circuit Court of Appeals decided this case, Fed.R.Evid. 803(5) was identical to the current version of I.R.E. 803(5). *Schoenborn*, 4 F.3d 1427, n.2.

527 F.2d 129, 137 (7th Cir. 1975). Here, Jose testified that he lacked recollection of the substance of the document and that his recollection was not refreshed by reading it. (Trial Tr., p.2057, Ls.10-24.)

However, the unsworn statement read to the jury was a summary of an interview conducted in 2002—it was not prepared by Jose, it was never adopted by Jose, and it did not accurately reflect his knowledge in 2002.

"[A] 'third party's characterization' of a witness's statement does not constitute a prior statement of that witness unless the witness has subscribed to that characterization." *United States v. Almonte*, 956 F.2d 27, 29 (2nd Cir. 1992). It is the party seeking to introduce the notes who has the burden of proving that such notes reflect the witness's own words rather than the note-taker's characterization. *Id.*

The Seventh Circuit Court of Appeals has set forth the necessary conditions for admitting a statement of past recollection recorded by another:

> Where a person perceives an event and reports it to another person who records the statement, both must ordinarily testify to establish that the statement is a past recollection recorded under Rule 803(5). The person who witnessed the event must testify to the accuracy of his oral report to the person who recorded the statement. The recorder must also testify to the accuracy of his transcription.

Schoenborn, 4 F.3d at 1427-28 (quoting *United States v. Williams,* 951 F.2d 853, 858 (7th Cir. 1992)). Further, the Seventh Circuit noted that when the witness and the individual who recorded the statement are in disagreement over the accuracy of the account, Rule 803(5)'s requirement that the document be made or adopted by the witness is not satisfied. *Id.* at 1428; *see also People v. Hoffman*, 518 N.W.2d 817, 825 (Mich. Ct. App. 1994) (holding that denying admission of police officer's typewritten notes of witness's statement was proper where witness never adopted statements as true and accurate when the matter was fresh in her mind); *People v. Kubasiak*, 296

N.W.3d 298, 302 (Mich. Ct. App. 1980) (holding that police report of witness's statement was inadmissible because witness had not adopted report as accurate when matter was fresh in his memory).

Here, the content of the document, as read aloud to the jury, reflects that this was a summary prepared from an interview of Jose on August 16, 2002. This is clear from the language used in the unsworn statement, such as:

> [O]n August 16th, 2002 I talked to Detective Enrique Garcia of the San Jose police homicide unit. . . When Detective Garcia talked to me, I told him that I knew why Detective Garcia wanted to see me. I told Detective Garcia that it was because Jorge killed his girlfriend. I told Detective Garcia during this interview that in late July or early August of 2002, Jorge arrived at the apartment that I shared with my sister Balvina, in San Jose, California. The rest of this statement shows what I told Detective Garcia about Jorge's visit and what happened during the visit.

(Trial Tr., p.2071, L.15 – p.2072, L.4.) The unsworn statement was not prepared by Jose, as evinced in the trial transcript. (Trial Tr., p.2061, Ls.12-18, p.2059, Ls.4-6.) In fact, Jose declined to adopt the statement. He testified that not everything in the statement was true. (Trial Tr., p.2053, Ls.1-3.)[3] Although presumably Detective Garcia prepared the statement based on his notes from his interview with Jose in 2002, this third party recorder did not testify at trial regarding his part in preparing the document. Thus, the unsworn statement was not prepared by Jose and he never adopted it.

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[3] For example, Jose testified that his unsworn statement was not true in 2009:

> Q: At the time you wrote or signed that statement in 2009, was it accurate?
> A: What do you mean "accurate"?
> Q: When you signed it was everything in there true?
> A: No.

(Trial Tr., p.2052, L.23 – p.2053, L.3.)

2. Jose's Unsworn Statement Was Not Prepared While The Matter Was Fresh In His Mind

Alternatively, should this Court find that Jose did testify at the preliminary hearing that the unsworn statement accurately reflected his knowledge in 2009, this is still insufficient to satisfy the rule as the unsworn statement would not have been adopted by the witness until seven years after the matter at issue, as discussed, *infra*. This fact, coupled with the fact that Jose claimed that information was added to the unsworn statement after he signed it, eviscerated the trustworthiness of the writing. Thus the unsworn statement should not have been read aloud to the jury, over defense counsel's objections.

Jose's unsworn statement was prepared more than seven years after the event at issue. Pursuant to I.R.E. 803(5), the document must have been prepared while the matter was fresh in the memory of the witness. Idaho appellate courts have not yet specifically addressed the freshness requirement, however, when interpreting the corresponding federal rule of evidence the federal courts have declined to impose a specific time constraint on the freshness requirement. *See Senak*, 527 F.2d at 141; *see also United States v. Lewis*, 954 F.2d 1386, 1393 (7th Cir. 1992) (holding that Fed.R.Evi. 803(5) "does not have specific time constraints on the timing of the preparation and adoption of memoranda."). As the Seventh Circuit found in *Senak*:

> [W]e believe the better view is that the discretion of the trial judge should not be rigidly bound by an inflexible rule but rather that it should be exercised on a case-by-case basis giving consideration to all pertinent aspects including the lapse of time which reasonably and properly bear upon the likelihood of the statement being an accurate recordation of the event to which the memory related.

Senak, 527 F.2d at 141 (holding that a statement made three years after the event was admissible but recognizing the existence of cases in which a much lesser period of time

was held to be fatal to admissibility); *United States v. Patterson*, 678 F.2d 774, 779 (9th Cir. 1982) (holding a ten month delay between the event and the statement was a close question, but that the trial judge did not abuse his discretion in admitting the record); *but c.f. United States v. FMC Corp.*, 306 F.Supp. 1106, 1137-38 (E.D. Pa. 1969) (holding that proffered grand jury testimony taken five to six years prior was too remote in time particularly in light of the memory lapses of the witness both at trial and when the grand jury testimony was taken); *United States v. Schwartz*, 390 F.2d 1 (3rd Cir. 1968) (holding several factors detracted from the probable reliability of the statement including that the statement was not given under oath and was made over seven years after the events described therein). The federal approach to whether a writing qualifies as a prior recorded recollection is to consider all of the factors "which reasonably and properly bear upon the likelihood of the statement being an accurate recordation of the event" on a case-by-case basis. *Senak*, 527 F.2d at 141. However, as aptly noted by the Utah Court of Appeals, although the lapse of time is typically just one of many circumstances bearing on the rule's freshness requirement:

> [W]here the lapse of time between the event and the actual recordation of the event in a memorandum or record is so substantial that it contradicts the very meaning of the term "fresh," that significant lapse of time weighs all but conclusively against a finding of freshness, absent other circumstances vouching for the recordation's freshness, accuracy, and trustworthiness.

TWN, Inc. v. Michel, 131 P.3d 882, 888 (Utah Ct. App. 2006) (holding that the trial court erred in allowing an affidavit prepared fourteen years after the event to be read into the record).

In this case, the document was not signed by Jose until 2009, which suggests that Detective Garcia (or someone in his office) transcribed what had been discussed in

the 2002 interview with Jose and prepared the resulting unsworn statement describing the topics of an interview that occurred seven years ago.

Further, Jose was asked about the lapse of time between when he spoke to the detectives and when he signed the statement:

> Q: Mr. Lopez, would it be true that the statement that you have in front of you was written two years ago?
>
> A: Two years ago? No.
>
> Q: When was the statement written?
>
> A: It says 2002.
>
> Q: Look at the last page where you signed it. You signed this statement in 2009, correct?
>
> A: It seems like it.
>
> Q: Okay. At the time that you signed this statement, did it truthfully say what you remember?
>
> A: Yes. I couldn't really remember much.
>
> Q: Okay. Does this statement set forth what you remembered in 2009?
>
> A: That's part of the statement that I gave in 2002 that's in the front of it.
>
> Q: Right. You provided a statement in 2002, correct?
>
> A: Yes.
>
> Q: And what you were told was put in this document in 2009, correct?
>
> A: Seems that way.
>
> Q: So when you signed this in 2009, was it true?
>
> A: That's what I said before.
>
> Q: Okay. And today you don't remember everything you remember in 2002?
>
> A: No.

Q: And today you don't remember everything you remembered in 2009?

A: No.

(Trial Tr., p.2058, L.9 – p.2059, L.15.)

Based upon the content of the unsworn statement, is apparent that the unsworn statement was prepared more than seven years after the incident Jose struggled to recall. Although the unsworn statement was likely created based on Detective Garcia's notes from his interrogation of Jose back in 2002, it does not appear that the document was actually prepared until 2009—seven years after Jose spoke to Detective Garcia. (Trial Tr., p.2059, Ls.1-6.)[4] The alleged conversation between Mr. Lopez-Orozco and his siblings was overheard in August of 2002, but Jose did not initial the unsworn statement until 2009. (Trial Tr., p.13, L.10 – p.2053, L.3, p.2058, L.9 – p.2059, L.6.) Although courts have held that there is no specific time requirement in order to find the document was created contemporaneously, the seven year time gap negates the extrinsic safeguards of trustworthiness upon which the rule is based.

3. The Unsworn Statement Attributed To Jose Does Not Satisfy The Requirements Of The Evidentiary Rule As It Does Not Accurately Reflect His Knowledge

The unsworn statement was not adopted by Jose in 2009 and does not accurately reflect his memory of events that occurred in 2002. Further, Jose testified that he never signed it under oath—that information was added after he signed it.

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[4] The prosecutor intimated the time sequence in her questions as follows:

Q: Right. You provided a statement in 2002, correct?
A: Yes.
Q: And what you were told was put in this document in 2009, correct?
A: Seems that way.

(Trial Tr., p.2059, Ls.1-6.)

Jose further called the accuracy of the document into question when he claimed that information was added to the statement after he signed it:

> A: I never said "I swear." I never said "I swear this is the truth." They wrote that after I signed it.
>
> Q: So you are saying that you signed it, and then they added the language about this being under
>
> A: Yes. Yes.
>
> Q: And who did that?
>
> A: The detectives.

(Trial Tr., p.2053, Ls.10-18.) Additionally, Jose could not even recall the information contained in his unsworn statement:

> Q: Did Jorge tell Balvina what happened to Becky?
>
> A: No. No. I don't remember. No.
>
> . . .
>
> Q: Do you remember what Jorge said happened to Becky?
>
> A: No.
>
> Q: So if I understand correctly, you don't remember Jorge saying that he shot Becky?
>
> A: No.

(Trial Tr., p.2057, Ls.5-7, p.2057, L.22 – p.2058, L.2.) Jose was confused when asked about the unsworn statement and did not know when the statement was written, but then seemed to agree that the statement was true when it was written, seven years after the interview. (Trial Tr., p.2058, L.9 – p.2059, L.15.) Where Jose repeatedly testified that he did not know, that he did not remember, or responded "no" when asked about the substance of the conversations at issue, it is clear he did not adopt the unsworn statement. Thus it is clear that the unsworn statement does not correctly

reflect Jose's knowledge of the conversation he overheard between Mr. Lopez-Orozco and his sister and the district court erred in allowing the unsworn statement to be read to the jury.

CONCLUSION

Mr. Lopez-Orozco requests that his convictions be vacated and the case remanded for further proceedings.

DATED this 5th day of August, 2014.

SALLY J. COOLEY
Deputy State Appellate Public Defender

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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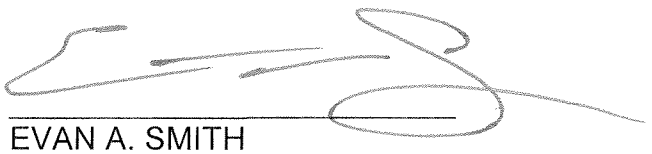

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SJC/eas